MEMORANDUM

Date: May 4, 2012

To: Mayor Earling
Council President Peterson
Edmonds City Council

From: Jeff Taraday, City Attorney

Re: **Woodway Elementary Plat and PRD:**
Analysis of Legal Issues Implicated in Appellants' Briefing

This memo addresses certain legal issues associated with arguments made in the briefs of the appellants.

For the following reasons, the city council's analysis on this closed-record review is more limited in scope than the typical closed-record review that might come before the city council. The preliminary plat and PRD in this matter were initially approved by the hearing examiner in 2007. The preliminary plat was appealed to the city council, which affirmed the hearing examiner's decision. Then the plat and PRD approvals were appealed under the Land Use Petition Act (LUPA) to superior court (where the hearing examiner's decision was reversed by the Honorable Anita L. Farris in February 2009). That decision was also appealed. The court of appeals ultimately remanded the matter to the hearing examiner in an unpublished decision filed on April 4, 2011. *Petso v. City of Edmonds*, 160 Wn. App. 1047 (unpublished). What follows is a series of questions and answers that you might ask during your consideration of this matter.

Scope of City Council Review

What is the scope of the city council's review on remand?

The Court of Appeals remanded the matter for further proceedings before the hearing examiner in three areas:

1. The drainage plan;
2. The perimeter buffer; and

3. Open space matters.

The court found that the hearing examiner's decision was erroneous in these three areas and sent it back to the hearing examiner to address those issues further.

> We hold that Lora Petso, the original petitioner in this LUPA proceeding, has met her burden under RCW 36.70C.130(1) to establish that ***this land use decision was incorrect, in part***. Pursuant to RCW 36.70C.140, we remand for further proceedings before the hearing examiner that are not inconsistent with this opinion.

Petso v. City of Edmonds, 160 Wn. App. 1047 (2011). In more specifically addressing the scope of remand later in the opinion, the court stated:

> We conclude that remand for further proceedings before the hearing examiner on the drainage plan, perimeter buffer, and open space matters that we address in this opinion is appropriate.

Petso v. City of Edmonds, 160 Wn. App. 1047 (2011). Because the court was reviewing an approval of the plat and PRD, and because it limited the scope of the remand to three incorrect issues within the land use decision, it follows that the remainder of the 2007 land use decision was found to be valid. Otherwise, the court would not have limited the remand to these three issues.

Are revisions to the proposal that was approved in 2007 properly within the scope of remand?

Yes. The court addressed this in responding to concerns that had been raised regarding the possibility of a limited scope remand.

> Third, she claims that approval on other issues assumed a proposal configured in a certain way. She contends that it is not possible to

> know on the ***limited review*** that Burnstead proposed ***whether any changed proposal would have still been approved as to other issues if configured differently***. We note with respect to this concern that it will still be Burnstead's burden on remand to demonstrate compliance with all applicable laws.

Petso v. City of Edmonds, 160 Wn. App. 1047 (2011) (emphasis added). In other words, to the extent that the applicant has changed its proposal in conjunction with the remand corrections, the applicant must demonstrate that any such changes comply with all applicable laws and do not cause other aspects of the project to fall out of compliance. It would not be consistent with the court of appeals decision, however, for every single aspect of the project to be reviewed *de novo* on remand. For an issue to be considered within the scope of the remand, it must be related to one of the three issues listed above, or it must relate to a change in the proposal since it was last approved.

Does the 2009 superior court decision further expand the scope of the issues before the city council in consideration of this appeal?

No. The Court of Appeals made this clear when it stated:

> On review of a superior court's decision, we stand in the shoes of the superior court and review the administrative decision on the record before the administrative tribunal, not the superior court record.[1]
>
> The petitioner in a LUPA proceeding carries the burden of establishing that the hearing examiner erred under any one or more

[1] *Satsop Valley Homeowners Ass'n, Inc. v. Northwest Rock*, Inc., 126 Wn. App. 536, 541, 108 P.3d 1247 (2005).

> of LUPA's six standards of review.[2] ***Notwithstanding the superior court's reversal of the hearing examiner's decision*** and Burnstead's appeal to this court, ***Petso's statutory burden to show that the hearing examiner's decision was erroneous remains unchanged before this reviewing court***.[3]

Petso v. City of Edmonds, 160 Wn. App. 1047 (2011) (emphasis added). The court reiterated this point again in addressing the remedies.

> Case authority also makes clear that we stand in the shoes of the superior court and review the administrative decision on the record before the administrative tribunal.[4]
>
> Accordingly, we review the land use decision of the hearing examiner based on the administrative record.[5] ***We do not review the superior court decision.***

Petso v. City of Edmonds, 160 Wn. App. 1047 (2011) (emphasis added). Essentially, the court of appeals decision replaced the superior court decision, almost as if the superior court decision never happened. Because of that, it would be inappropriate to look to the superior court decision for the purposes of determining the scope of your review.

SEPA Review

Did the court of appeals overturn the city's issuance of an MDNS under SEPA?

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[2] *See Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assoc.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004).
[3] *Id.*
[4] *Satsop Valley Homeowners*, 126 Wn. App. at 541, 108 P.3d 1247.
[5] *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 525, 94 P.3d 366 (2004).

No. While the superior court did reverse the City's approval of the MDNS, the court of appeals did not. Nor did the court of appeals remand the matter for further proceedings under SEPA. Therefore, because the court of appeals stands in the shoes of the superior court, one cannot challenge SEPA on the basis of the superior court decision.

What SEPA review was required to be done on remand and can the city rely on its MDNS from 2007?

Generally, the city is required to use the existing environmental document (in this case a Mitigated Determination of Non-Significance (MDNS)) unchanged when it is acting on the same proposal for which the document was prepared. WAC 197-11-600(3). There are two exceptions to that rule if there are: 1) substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts; or 2) new information indicating a proposal's probable significant adverse environmental impacts. WAC 197-11-600(3)(b). In the absence of these two exceptions, the city would not be required to prepare a new threshold determination.

Can there be an administrative appeal of the city's SEPA review in conjunction with the closed-record review?

No. Because the city has not made a new threshold determination, there is no administrative SEPA appeal on remand. ECDC 20.15A.240.A. Furthermore, even if a new threshold determination had been made, the administrative appeal of that determination would go to the hearing examiner and it would not be appealable to the city council. ECDC 20.15A.240.C.

Vested Rights

Does the hearing examiner's decision allow selective waiver of land use regulations in violation of the doctrine announced in East County Reclamation District v. Bjornsen?

No. The *East County Reclamation District* case involved an application for a privately owned landfill where the hearing examiner ruled that the applicant could waive its vested right to review of the proposal under the 1988 solid waste management plan in effect at the time the application

was filed. The 1988 (vested) solid waste management plan prohibited privately owned landfills. The 1994 solid waste management plan -- adopted after vesting -- allowed them.

The hearing examiner also ruled that the applicant could exercise this vested rights waiver selectively and avoid compliance with concurrency and critical aquifer recharge area regulations enacted after the application was filed, but in effect at the time of the 1994 solid waste management plan.

Under this set of facts, "allowing this selective waiver of land use regulations results in projects that do not comply with any law, violate the public's right to a coherent land development system, and add difficulty to an already complex system of land use regulations." *E. County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 436, 105 P.3d 94, 97 (2005). The court in that case ruled that such selective waiver was not proper.

> We agree that a developer is entitled to rely on the law in effect at the time he files a development application. But ***the vested rights doctrine does not allow a developer to file an application for an impermissible use and then to selectively waive its vested rights so it can benefit from parts of newly-enacted regulations*** allowing the use without having to comply with other parts of those same new regulations. Thus, we hold that the hearing examiner erred by accepting East's selective waivers and by failing to review East's application under the regulations and law in effect at the time it chose to file its initial application.

E. County Reclamation Co. v. Bjornsen, 125 Wn. App. 432, 437, 105 P.3d 94, 97 (2005) (emphasis added). With regard to the Woodway Elementary Plat and PRD, the applicant is not *benefiting* from parts of newly-enacted regulations. While it is true that the 2005 King County stormwater manual will be utilized in determining the design infiltration rate, that part

of the 2005 King County stormwater manual does not benefit the applicant. Rather, that manual requires a minimum safety factor of 5.5 (record, at 179), where the 1992 manual has a safety factor of 2 (1992 manual, p. III-3-16). The larger safety factor in the 2005 King County stormwater manual "provides a more conservative approach than the 1992 Ecology manual"[6] to which the applicant is vested. Therefore, we do not have the "cherry-picking" problem here of a project that does not comply with any law.

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[6] Record, at 21.